FILED
JAN 21 1993
OFFICE OF THE CLERK

No. 92-687

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES
1331 Pennsylvania Ave., N.W.
Suite 1500-North Lobby
Washington, D.C. 20004
(202) 637-3000

PETER G. NASH *
MARSHALL B. BABSON
ELIZABETH I. TORPHY-DONZELLA
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
2400 N Street, N.W.
Fifth Floor
Washington, D.C. 20037
(202) 887-0855
Counsel for the Chamber of Commerce of the United States of America and for the National Association of Manufacturers of the United States of America Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTERESTS OF THE AMICI CURIAE	1
SUMMARY OF THE CASE	4
REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI	6
I. PAID UNION ORGANIZERS ARE NOT "EMPLOYEES" UNDER THE LANGUAGE OF SECTION 2(3) OF THE ACT	6
II. THE D.C. CIRCUIT FAILED TO EXAMINE THE STRUCTURE OF THE NATIONAL LABOR RELATIONS ACT AND ITS ANIMATING POLICIES AND THUS FAILED TO APPREHEND THAT THE BOARD'S INCLUSION OF PAID UNION ORGANIZERS IN THE DEFINITION OF "EMPLOYEE" WAS AN UNREASONABLE INTERPRETATION OF THE ACT	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) 13
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 2
Anthony Forest Products, 231 NLRB 976 (1977) .. 7
Betra Mfg. Co., 233 NLRB 1126 (1977), *enf'd*, 624 F.2d 192 (9th Cir. 1980), *cert. denied sub nom. Thomas v. NLRB*, 450 U.S. 996 (1981) 16
Blassie v Kroger Co., 345 F.2d 58 (8th Cir. 1965) .. 14
Canonie Transportation Co., 289 NLRB 299 (1988) 16
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 7, 8
Dee Knitting Mills, Inc., 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975) 7
Dubuque Packing Co., Inc., 303 NLRB No. 66 (1991) 16
E.I. DuPont de Nemours & Co., Inc., 210 NLRB 395 (1974) 16-17
Escada (USA), Inc., 304 NLRB No. 109 (1991), *enf'd without opinion*, 970 F.2d 898 (3d Cir. 1992) 7
Escada, Inc. v. NLRB, 970 F.2d 898 (3d Cir. 1992) 3
Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 2
First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 16
Fort Smith Chair Co., 143 NLRB 514 (1963), *aff'd on other grounds*, 336 F.2d 738 (D.C. Cir. 1964) .. 11
Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974) 3
General Electric Co. v. NLRB, 412 F.2d 512 (D.C. Cir. 1969) 15
General Motors Corp. v. Romein, 112 S.Ct. 1105 (1992) 3
Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991) 2
Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986) 2

TABLE OF AUTHORITIES—Continued

	Page
H.B. Zachry Co., 289 NLRB 838 (1988) *enf. denied* 886 F.2d 70 (4th Cir. 1989)	7
H.B. Zachry Co. v. NLRB, 886 F.2d 70 (4th Cir. 1989)	4, 17, 18
H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1940)	15
Henlopen Mfg. Co., 235 NLRB 183 (1978), *enf. denied on other grounds*, 599 F.2d 26 (2d Cir. 1979)	7
Lechmere, Inc. v. NLRB, 112 S.Ct. 841 (1992)	9, 14, 15, 17
Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988)	2
Machinists v. NLRB, 311 U.S. 72 (1940)	15
Margaret Anzalone, Inc., 242 NLRB 879 (1979)	7
Multimatic Products, 288 NLRB 1279 (1988)	17
Nationwide Mutual Insurance Co. v. Darden, 112 S.Ct. 1344 (1992)	8, 14
NLRB v. Amax Coal Co., 453 U.S. 322 (1981)	15
NLRB v. Bell Aerospace, 416 U.S. 267 (1974)	13, 19
NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972)	2
NLRB v. Corsicana Cotton Mills, 178 F.2d 344 (5th Cir. 1949)	16
NLRB v. Electrical Workers, 481 U.S. 573 (1987)	15
NLRB v. Elias Bros. Big Boy, Inc., 327 F.2d 421 (6th Cir. 1964)	4
NLRB v. Henlopen Mfg. Co., Inc., 599 F.2d 26 (2d Cir. 1979)	4
NLRB v. News Syndicate Co., 365 U.S. 696 (1961)	16
NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (2d Cir. 1961)	16
Oak Apparel, Inc., 218 NLRB 701 (1975)	7
Office Employees Int'l Union, Local 11 v. NLRB, 353 U.S. 313 (1957)	10
Palby Lingerie, 252 NLRB 176 (1980)	7
Parker-Robb Chevrolet, 262 NLRB 402 (1982), *review denied sub nom. Auto Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983)	11, 16
Phelps Dodge Corp. v. NLRB, 313 U.S. 717 (1941)	7
Pilliod of Mississippi, Inc., 275 NLRB 799 (1985)	7

TABLE OF AUTHORITIES—Continued

Page

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 2
Sakrete of N. Cal., Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965) 16
Scofield v. NLRB, 394 U.S. 423 (1969) 16
Sears, Roebuck and Co., 170 NLRB 533 (1968) 7
Star Tribune, 295 NLRB 543 (1989) 16
Sunland Construction Co., Inc., 309 N.L.R.B. No. 180 (1992) 2, 7, 10, 11
Teamsters v. Daniel, 439 U.S. 551 (1979) 3
Town & Country Electric, Inc., 309 NLRB No. 181 (1992) 2, 7, 10
Trans World Airlines v. Thurston, 469 U.S. 111 (1985) 2
299 Lincoln Street, Inc., 292 NLRB 172 (1988) 17
United Technologies Corp., 274 NLRB 1069 (1985), *enf'd*, 789 F.2d 121 (3d Cir. 1986) 16
Willmar Electric Service, Inc. v. NLRB, 968 F.2d 1327 (D.C. Cir. 1992) 6, 12-13, 18, 19
Windemuller Electric, Inc., 306 NLRB No. 125 (1992) 7
Zayre Dep't Stores, 289 NLRB 1183 (1988) 16

STATUTES

Labor Management Relations Act,

29 U.S.C. § 186 7
29 U.S.C. § 186(c) (1) 13
29 U.S.C. § 186(c) (5) 13

National Labor Relations Act,

29 U.S.C. § 152(2) 8, 9, 12, 14
29 U.S.C. § 152(3) ..... *passim*
29 U.S.C. § 152(5) 9
29 U.S.C. § 157 ..... 14, 17
29 U.S.C. § 158(a) (1) 5, 12
29 U.S.C. § 158(a) (2) 5, 15, 17
29 U.S.C. § 158(a) (3) 5, 12
29 U.S.C. § 158(b) (1) (A) 15-16
29 U.S.C. § 158(b) (1) (B) 15

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIAL Page

S. Rep. No. 573, 74th Cong., 1st Sess. (1934), *reprinted in* 2 Legislative History of the National Labor Relations Act, 1935 10

S. Rep. No. 1184, 74th Cong., 2d Sess. (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935 9-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-687

WILLMAR ELECTRIC SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTERESTS OF THE AMICI CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations in the United States. A significant aspect of the Chamber's ac-

---

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. Letters of consent are being filed simultaneously with the Clerk of Court.

tivities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.[2] The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[3]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of over 12,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these councils provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. Like the Chamber, the NAM actively represents the interests of its member employers in a wide variety of labor and employment matters before the

---

[2] The Chamber participated as an *amicus curiae* in oral argument before the National Labor Relations Board in that body's consideration of the same issue presented in this case—whether paid union organizers are protected employees under Section 2(3) of the National Labor Relations Act. *See Town & Country Electric, Inc.*, 309 NLRB No. 181 (1992); *Sunland Construction Co., Inc.*, 309 NLRB No. 180 (1992), both argued March 18, 1992.

[3] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972).

courts,[4] the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

This case raises the important issue of whether an employer violates the National Labor Relations Act ("NLRA" or the "Act") by rejecting the employment application of a full-time paid union organizer who applies for a job with a company for the purpose of organizing that company's employees on behalf of his union. The issue turns on whether such an organizer is an "employee" as defined by the NLRA, 29 U.S.C. § 152(3) (1988). If paid union organizers are "employees" under the NLRA, then they enjoy all of the protections of the Act, and the members of the Chamber and the NAM must treat them as legitimate job applicants and make the decision on whether to hire them without regard to their status as union organizers. On the other hand, if such applicants are not "employees" protected by the NLRA, then employers are free to refuse to hire them.

A resolution of this issue is of vital concern to the Chamber, the NAM, and their members, many of whom are non-unionized companies that are receiving employment applications from paid union organizers whose primary interest in gaining employment is not to work for the companies, but to organize their workforce for the benefit of a union. These employers need to know whether they must consider these paid union organizers as legitimate job applicants or whether they may rightfully refuse to hire these individuals.

Moreover, review by this Court is particularly necessary to resolve a conflict among the circuit courts of appeals on this issue. *Compare Escada, Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (enforcing without opinion

---

[4] *See, e.g., General Motors Corp. v. Romein*, 112 S.Ct. 1105 (1992); *Teamsters v. Daniel*, 439 U.S. 551 (1979); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974).

Board's conclusion that paid union organizer is employee under NLRA) *and NLRB v. Henlopen Mfg. Co., Inc.*, 599 F.2d 26 (2d Cir. 1979) (holding paid union organizer to be statutory employee) *with H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989) (holding paid union organizer is not statutory employee) *and NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) (same).

SUMMARY OF THE CASE

Petitioner, Willmar Electric Service, Inc. ("Willmar"), is an electrical contracting company that was awarded a contract in the early summer of 1988 to perform electrical work on a store under construction in Silverdale, Washington. Pet. App. A17.[5] Michael Hendrix is a journeyman electrician who took a leave of absence from an electrical contractor in June of 1988 to become a full-time paid union organizer for Local 46 of the International Brotherhood of Electrical Workers ("IBEW" or "union"). *Id.* at A18.

In late June, Hendrix asked Willmar officials to enter into a collective bargaining agreement with the IBEW for the project and, in July, sent Willmar a draft of one of the union's recently ratified contracts. Willmar responded that it was not interested in signing a contract with the union, but was willing to receive applications from IBEW electricians. *Id.* at A18. Throughout the remainder of the year, and in his capacity as a paid union organizer, Hendrix continued to press Willmar officials to enter into a contract with the IBEW. Willmar continued to respond that it would not enter into such a contract, but would accept applications from IBEW electricians. *Id.* at A10. On October 14, Hendrix hand delivered his completed job application to Willmar's project

---

[5] Throughout this brief "Pet. App." will be used to refer to the Petitioner's Appendix and "Pet. Br." will be used to refer to the Petitioner's Brief.

foreman, Douglas Rose.[6] Hendrix's application stated that his present employer was the IBEW. Hendrix told Rose that, if hired, Hendrix intended to continue his organizing efforts on behalf of the IBEW at Willmar.[7] *Id.* at A3.

After submitting his application, Hendrix continued his organizing activities at Willmar. As part of his IBEW duties, Hendrix organized and participated directly in a picket line in front of the Willmar job site.[8] *Id.* at A22-23. On December 30, 1992, Hendrix called Rose to inquire about his job application. Rose admitted that he had not taken Hendrix's application seriously, and that Willmar was not interested in hiring a full-time union organizer. As Rose observed, "it's kind of hard to hire you when you're out there on the other side, picketing." *Id.* at A25.

Hendrix responded by filing unfair labor practice charges with the NLRB against Willmar, claiming that Willmar's refusal to hire him because of his union organizing activities violated Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (3) (1988). *Id.* at A9. The Board found in favor of Hendrix. In doing so, the Board adhered to its view from prior cases that full-time paid union organizers are "employees" protected by the NLRA and that an employer who refused

---

[6] Hendrix's application contained two dates: September 28, the date on which he began filling out the employment application, and October 10, the date he completed the application. Pet. App. A21 n.5.

[7] Hendrix later stated that "obtain[ing] employment . . . to carry out . . . field organizing responsibilities" is "normal activity for field organizers." Pet. App. A11. Hendrix claimed that his organizing activities would be limited to his "free time" during lunch and after work. Pet. App. A3, A26.

[8] This picketing was preceded by a letter from Hendrix, signed in his capacity as union field organizer and written on union stationery, warning Willmar that such picketing would commence due to Willmar's allegedly substandard wages. Pet. App. A23.

to hire such an "employee" because of his union position violated the NLRA. *Id.* at A11-12. The D.C. Circuit enforced the Board's decision, declaring the Board's construction of the definition of "employee" to be "reasonable" in light of common law principles of agency and the apparent absence of a clear and contrary congressional indication. *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1330-31 (D.C. Cir. 1992).

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

As explained by Willmar in its Petition, the D.C. Circuit's construction of the term "employee" as including paid union organizers who must be considered by an employer for employment is in direct conflict with the conclusions reached by both the Fourth and the Sixth Circuits. *See* Pet. Br. 8-13. The *amici* submit that the uncertainty created for employers and unions alike by this split of opinions is, by itself, powerful reason for this Court to grant the Petition.

We will not reiterate Petitioner's other arguments to support grant of the Petition. Rather, the *amici* demonstrate below that the D.C. Circuit's inclusion of paid union operatives in the Act's definition of the term "employee" is contrary to both (1) the plain meaning of the NLRA and (2) to the policies underlying that Act. Accordingly, we respectfully submit that the Court should grant the Petition and issue a writ of certiorari to reverse the decision below.

I. PAID UNION ORGANIZERS ARE NOT "EMPLOYEES" UNDER THE LANGUAGE OF SECTION 2(3) OF THE ACT.

In approaching the question of whether paid union organizers are protected employees[9] under Section 2(3)

[9] The Board announced its position on the employee status of paid union organizers in a footnote that it candidly described as

of the NLRA, the D.C. Circuit correctly observed that its analysis should begin with the question of whether Congress had clearly resolved the issue so as to prohibit the courts and the Board from concluding that they were "employees." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Having made this observation, however, the court ignored this initial step by inexplicably failing to analyze the terms of the NLRA itself. Instead, the court relied on an analysis of § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186 (1988), and on common law principles of agency, and erroneously concluded that the Board's interpretation of the NLRA definition of "employee" to include paid union organizers was a reasonable one.[10] As we show below, had the court considered the

---

dictum in *Sears, Roebuck and Co.*, 170 NLRB 533, 535 n.3 (1968), stating "[a]s long as the employee gives a full day's work to his 'regular' employer, the fact that he renders services in other hours to the Union does not affect his employee status, whether such latter services are paid or not." In *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975) (unpublished opinion), and *Oak Apparel, Inc.*, 218 NLRB 701 (1975), the Board developed this dictum into a definitional imperative, finding paid union organizers to be protected "employees" under Section 2(3) even if they were working for an employer for the express purpose of organizing that employer's employees. The Board has adhered to this interpretation, *see Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985); *Palby Lingerie*, 252 NLRB 176 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879 (1979); *Henlopen Mfg. Co.*, 235 NLRB 183 (1978), *enf. denied on other grounds*, 599 F.2d 26 (2d Cir. 1979); *Anthony Forest Products*, 231 NLRB 976 (1977), and, in light of this Court's decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 717 (1941), has extended it to include paid union organizers who apply for work to organize an employer. *H.B. Zachry Co.*, 289 NLRB 838 (1988) *enf. denied* 886 F.2d 70 (4th Cir. 1989). *See also Town & Country Electric, Inc.*, 309 NLRB No. 181 (1992); *Sunland Construction Co., Inc.*, 309 NLRB No. 180 (1992); *Windemuller Electric, Inc.*, 306 NLRB No. 125 (1992); *Escada (USA), Inc.*, 304 NLRB No. 109 (1991), *enf'd without opinion*, 970 F.2d 898 (3d Cir. 1992).

[10] *Chevron* dictates that, in the absence of a clear resolution of an issue by Congress, the reviewing court should defer to the agency's

terms of the NLRA, it would have discovered that Congress had clearly resolved this issue by expressly excluding paid union organizers from the definition of "employee." 29 U.S.C. § 152(3) (1988).

Section 2 of the NLRA defines, *inter alia*, the terms "employer," "employee" and "labor organization." Each entity is recognized as distinct and apart from the others by the language of the definitions. In Section 2(2) of the Act, the term "employer"

> includes any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, *or any labor organization (other than when acting as an employer)*, or anyone acting in the capacity of officer or agent of such organization.

29 U.S.C. § 152(2) (1988) (emphasis added).

The definition of "employee" is set out in Section 2(3) and states

> the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . *but shall not include any individual employed* as an agricultural laborer, or in the domestic service

---

interpretation of the statute, if it constitutes a reasonable one. *Chevron*, 467 U.S. at 842-43. The D.C. Circuit also observed that under this Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992), absent a clear congressional indication to the contrary, the term "employee" should be taken to have its common law meaning. As demonstrated in this Section, Congress clearly excluded union organizers from the definition of "employee" by the terms of the NLRA. Even had Congress not done so, we show in Section II, *infra*, that the common law, interpreted in light of the relationship of employers and unions codified in the NLRA, does not support the conclusion that paid union organizers are employees when they seek to organize another employer.

> of any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, *or by any other person who is not an employer as herein defined.*

29 U.S.C. § 152(3) (1988) (emphasis added).[11]

As the foregoing makes clear, the definitions of these terms are interrelated and refer to each other. While the term "employee" is defined broadly, the term expressly excludes anyone who is employed "by any other person who is not an employer" as defined by the Act. Similarly, although the term "employer" is broad, it contains a number of exclusions, including one for a "labor organization." Through these two interrelated exclusions, Congress has spoken: individuals who are paid employees of a labor organization—including paid union organizers—are *not* "employees" under the NLRA.

In Section 2(2), Congress did add a parenthetical phrase stating that a union is an employer when it is "acting as an employer." That phrase, however, confirms the conclusion that a union's agents are not "employees" when dealing with another employer, like Willmar. Indeed, this parenthetical statement was added for the limited purpose of subjecting labor organizations to the strictures of the NLRA in their treatment of their own employees. *See* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934),

---

[11] Section 2(5) defines a "labor organization" as

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1988). While the Act defines a labor organization as comprised of employee-members, as this Court has emphasized, a labor organization has an identity distinct from that of its constituents. *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 848 (1992).

reprinted in 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (stating that "[i]n its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides."). *See also Office Employees Int'l Union, Local 11 v. NLRB*, 353 U.S. 313, 316 (1957) (holding Teamsters to be employer liable for unfair labor practices in interferring with right of its clerical employees to organize themselves). Congress understood that any broader application of "employer" status to labor organizations would "deprive unions of one of their normal functions", namely, organizing *other* employees. S. Rep. No. 573, 74th Cong., 1st Sess. 6 (1934), *reprinted in* 2 Legislative History of the National Labor Relations Act, 1935, 2300, 2305. *See also* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (distinguishing between a union's relation with its "clerks, secretaries and the like" and its actions as an advocate of unionization). Thus, Congress drew a sharp distinction between the union in its relationship with its own employees regarding their own wages, hours, and terms and conditions of employment and the union's organizing activities of other employers. The union, in short, was to be an "employer" only in the limited context of its relations with its *own* employees. Paid agents of labor organizations were intended to be statutory "employees" only when dealing with their own employer, the union, *not* when dealing with some other employer.[12]

---

[12] The NLRB, in its most recent statement on the "employee" status of paid union organizers, asserted that it was "immaterial" to its analysis whether a union is a statutory employer because the paid union organizer draws his "employee" status from his attempted employment with the targeted employer. *Town & Country Electric, Inc., supra* note 2, 309 NLRB No. 181, slip op. at 18, n.36; *Sunland Construction Co., Inc., supra* note 2, 309 NLRB No. 180, slip op. at 15, n.37. The Board analogized the union organizer to an agricultural or government worker (neither of whom is an "employee" under Section 2(3) of the Act) who seeks work with an

It is clear, in light of these definitions, that Hendrix was not a statutory employee when he sought a job with Willmar to organize its workforce. When a paid union organizer, like Hendrix, applies for work in order to organize an employer, and is paid by his union to do so, he is carrying out duties as a union agent that bring him outside the ambit of protections provided to "employees" under the NLRA. Lacking "employee" status, Hendrix, like any other non-employee, could be rejected or dismissed by any employer without violating the NLRA.[13] In this respect, a paid union organizer like Hendrix is similar to a company supervisor who is also excluded from the definition of "employee" under Section 2(3) of the Act, and who may be discharged because of his union activities or sympathies. *See, e.g., Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *review denied sub nom. Auto Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

"employer covered by the NLRA" and thus becomes an "employee" vis-a-vis that new employer. The Board's summary conclusion, however, simply does not take account of the policies underlying the NLRA or of the facts of the cases under consideration. Thus, as a matter of fact, and unlike the typical agricultural or federal employee seeking a second job, a paid union organizer like Hendrix applies for a job with a targeted employer like Willmar in furtherance of his job as a union organizer. *See supra* note 7, and *infra* note 18. Indeed the NLRB, itself, recognized that paid union organizers (unlike agricultural or government employees) can be presumed to owe their primary allegiance to the union. *Sunland, supra*, slip op. at 17, n.41. Furthermore, as discussed in Section II, *infra*, as a matter of NLRA policy, Congress has struck a delicate balance between employers, unions and employees. This balance is destroyed when employees of labor organizations who apply for work in order to further their union's organizational objectives are deemed indistinguishable from any employee who seeks a second job.

[13] *Cf. Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963), *aff'd on other grounds*, 336 F.2d 738 (D.C. Cir. 1964) (loss of "employee" status under the NLRA means loss of the Act's protection and an employer's motive for discharging those who have forfeited this status—including its otherwise unlawful desire to rid itself of the employees' union—is immaterial).

The D.C. Circuit failed to confront the clear statutory exclusion of paid union operatives from "employee" status by operation of Sections 2(2) and 2(3) of the NLRA. In failing to comprehend the exclusion of labor organizations from the statutory definition of "employer," the circuit court ratified the NLRB's mistaken focus on the otherwise broad definition of "employee" in Section 2(3), and its mistaken conclusion that the employment of such individuals by the union to organize an employer is immaterial to his statutory "employee" status. *See* notes 9 and 12, *supra*, and cases discussed therein. Given that mistaken analysis, the court improperly concluded that an employer who flatly refused to hire a paid union organizer (a protected "employee" in the court's view) violated Section 8(a)(1) and (3) of the NLRA. 29 U.S.C. § 158(a)(1) and (3).

In light of the foregoing, the D.C. Circuit's analysis and conclusions are simply at odds with the language of the NLRA and this Court should grant the petition for a Writ of Certiorari to correct the court's error.

II. THE D.C. CIRCUIT FAILED TO EXAMINE THE STRUCTURE OF THE NATIONAL LABOR RELATIONS ACT AND ITS ANIMATING POLICIES AND THUS FAILED TO APPREHEND THAT THE BOARD'S INCLUSION OF PAID UNION ORGANIZERS IN THE DEFINITION OF "EMPLOYEE" WAS AN UNREASONABLE INTERPRETATION OF THE ACT.

As demonstrated in Section I, the D.C. Circuit failed to apprehend the express exclusion of paid union agents from the NLRA definition of employee by the terms of the Act itself. Even absent this express language, however, the D.C. Circuit understood that this exclusion could be supported on the "grounds of some implication from the structure of the Act." [14] *Willmar*, 968 F.2d at

[14] This Court has recognized that the failure of Congress to expressly exclude a category of employees from § 2(3) is not, with-

1329. Having made this observation, the D.C. Circuit proceeded to ignore the structure of the NLRA and its policies and thus erroneously concluded that paid union organizers were "employees" under the NLRA. Instead, the court simply concluded that one person could work for both a union and an employer at the same time and that, to the extent that the individual worked for the employer, that person was a protected "employee" as defined by the Act. In support of this conclusion, the court relied upon Section 302(c)(1) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(1), as evidence that Congress had recognized that one could be employed concurrently by both a union and a company.[15] Since the court failed to consider the underlying structure and policies of the NLRA, however, it failed to appreciate the difference between Section 302, which *allows* an employer to employ a union official if it wishes to do so, and the NLRB decision before it which ***required*** the employer to employ the paid union organizer.[16]

---

out more, determinative of their status under the Act. *NLRB v. Bell Aerospace*, 416 U.S. 267, 283 n.13 (1974) (holding managers to be excluded from the NLRA definition of "employee").

[15] Section 302 restricts payments that can legally be made to employee representatives. Section 302(c)(1) *excludes* from this restriction

> any money or thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration *or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee . . . of such employer*, as compensation for, or by reason of his service as an employee of such employer.

29 U.S.C. § 186(c)(1) (1988) (emphasis added).

[16] The court's logic in this regard is no more persuasive than that of the Board, rejected by this Court in *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 170-171 (1971), that retirees are "employees" under the NLRA because of their employee status under § 302(c)(5) of the LMRA. 29 U.S.C. § 186(c)(5) (1988). As stated in note 15, *supra*, Section 302 generally pro-

In concluding that paid union organizers were employees under the NLRA, the D.C. Circuit also purported to apply the presumption articulated in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992), that the term "employee" should be construed according to common law principles absent a clear Congressional indication to the contrary. As *amici* have demonstrated, the D.C. Circuit failed to recognize the clear exclusion of paid union organizers from the definition of "employee" by the operation of Sections 2(2) and 2(3) of the Act. Furthermore, as shown below, the structure of the NLRA and its animating policies indicate that Congress meant to exclude union organizers from the class of persons protected by the Act, a factor which renders the D.C. Circuit's common law analysis irrelevant.

Even a cursory analysis of the structure of the NLRA shows why the D.C. Circuit was wrong in this case. By design, employers, unions, and employees constitute three distinct groups under the NLRA. The major emphasis of the Act is to protect the rights of employees by keeping employee interests distinct from those of employers and of unions. *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 848 (1992). The paramount employee right under the NLRA

---

hibits payments by employers to unions or union officials. Section 302(c)(5) provides an exemption for payments to an employee trust fund established for the sole and exclusive benefit of the employees of such employer. The Section had been construed to include retirees in *Blassie v. Kroger Co.*, 345 F.2d 58, 70 (8th Cir. 1965). This Court found the Board's Section 302 analysis wanting:

> There is no anomaly in the conclusion that retired workers are "employees" within § 302(c)(5) entitled to the benefits negotiated while they were active employees, but not "employees" whose ongoing benefits are embraced by the bargaining obligation of § 8(a)(5).

Id. at 170. In *Pittsburgh Plate Glass*, § 302 was no indication that retirees were "employees" under the NLRA, and in this case LMRA § 302(c)(1) is no indication that Congress intended paid union organizers to be "employees" that an employer was required to consider for hire without regard for that status.

is the Section 7 right to form, join or assist labor organizations or to refrain from doing so. 29 U.S.C. § 157 (1988). Unions and employers have the right to convince employees legitimately that they either should or should not support a union, but neither has the right to make that decision for employees. *Lechmere*, 112 S.Ct. at 849.

Recognizing that employee interests are best served by independent persuasion from labor and management, Congress carefully separated unions and employers from each other and designed the NLRA to keep either from interfering with the independence of the other. There are numerous examples of the independent, and at times adversary, roles that are delineated for employers and unions under the NLRA.

A first principle of the NLRA is that labor and management may not dictate who shall be the collective bargaining agents of the other. *See generally, General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (D.C. Cir. 1969) (discussing fundamental right of both employers and employees to choose their own bargaining representatives). Consistent with this principle, the NLRA prohibits an employer from interfering "with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2) (1988). An employer violates that section of the Act if its managers and supervisors play a meaningful role in the selection of a union as the employees' bargaining representative. *Machinists v. NLRB*, 311 U.S. 72, 79-80 (1940); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 519-20 (1940). Similarly, the Act prohibits a labor organization from restraining management in the selection of its representatives. 29 U.S.C. § 158(b)(1)(B) (1988). *NLRB v. Electrical Workers*, 481 U.S. 573 (1987); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-335 (1981).

Further evidence of the independent and distinct roles occupied by employers and unions under the Act is that no union is required to bargain with an employer about the union's rules of membership, 29 U.S.C. § 158(b)(1)

(A) (*proviso*); *Betra Mfg. Co.*, 233 NLRB 1126, 1135 (1977), *enf'd*, 624 F.2d 192 (9th Cir. 1980), *cert. denied sub nom. Thomas v. NLRB*, 450 U.S. 996 (1981); *NLRB v. Corsicana Cotton Mills*, 178 F.2d 344 (5th Cir. 1949), or about how the union runs its affairs. *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 720 (2d Cir. 1961); *Zayre Dep't Stores*, 289 NLRB 1183, 1186 (1988). By the same token, management is not required to bargain with a union about the individuals the employer hires, *Star Tribune*, 295 NLRB 543, 547-48 (1989); *United Technologies Corp.*, 274 NLRB 1069, 1070 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986), or about the employer's basic decisions on how it will run its business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *See also Dubuque Packing Co., Inc.*, 303 NLRB No. 66 (1991).

The NLRA has been construed to allow an employer to discharge its managers and supervisors who support union representation. *E.g., Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *review denied sub nom. Auto Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Similarly, a union may expel its members who aid management by working during a strike. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

Furthermore, an employer may permit its managers and supervisors to join a union, but it is not required by the Act to do so. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 n.2 (1961). By the same token, a union is not required to accept any management representative into it ranks, although it may do so voluntarily. *Id. See also Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

Finally, by way of example, managers or supervisors of an employer may not vote in an NLRB election to determine whether employees will become represented by a union. *See, e.g., Canonie Transportation Co.*, 289 NLRB 299, 300 (1988); *E.I. DuPont de Nemours & Co., Inc.*,

210 NLRB 395, 396-97 (1974). And, the Board generally excludes paid union organizers from voting as well. *See, e.g., 299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988); *Multimatic Products*, 288 NLRB 1279, 1316 (1988).

Given the foregoing examples, it is inconceivable that Congress could have intended that employers would be *required* to hire full-time union organizers. Indeed, it is apparent that the contrary conclusion of the D.C. Circuit in this case is in direct conflict with core principles of the NLRA.

Just last term, this Court reiterated that union organizers could not use the Section 7 rights of the employees they sought to organize to excuse their trespass onto an employer's property. *Lechmere*, 112 S.Ct. at 848. Nonetheless, the D.C. Circuit has concluded that the union can assume the rights of employees by the simple expedient of directing its paid agents to apply for employment with a non-unionized company. But this dispatch of its agents to the employer's work site, employment applications in hand, no more changes the character of the union's rights than if an employer sent its supervisors to apply for a job with a union and thereby attempted to vest them with "employee" status for the purpose of advancing the employer's opposition to unionization from within the union. Neither the union nor the employer should be permitted to gain "employee" status for its paid agents through such stratagems.

Moreover, as the Fourth Circuit recognized in the *Zachry* case, the requirement that an employer accept into its ranks paid union organizers, particularly during a representation campaign, effectively requires the employer to subsidize the organizational activities of the union that, by statute, it may oppose. *Zachry*, 886 F.2d at 75. Indeed, Congress, in Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), sought to maintain the independence of unions for the benefit of employees by prohibiting employers from funding their efforts. As the *Zachry* court observed,

> Because the salary paid such "employees" by the company would partially relieve the union of its obligation to pay its own organizers, this tactic ironically could be construed to compel employers to subsidize labor organizations in violation of section 8(a)(2) . . . It is difficult to imagine a scenario more slanted to one side's advantage.

Id. at 75. The D.C. Circuit cursorily dismissed this concern, stating that Section 8(a)(2) was not violated "so long as Willmar gets a day's work for a day's pay out of Hendrix." *Willmar*, 968 F.2d at 1329 n.1. Such an assertion, however, ignores the fact, recognized by the Fourth Circuit, that the employer's payments to the union's professional organizer relieved the union of the burden of paying him without any real loss of his services.[17] In the realm of organizing, most employers and unions are adversaries—competitors for the sympathies of the employees. No competitor should be *required* to subsidize the competition. Yet, the decision of the D.C. Circuit ignores logic and the very fabric of the NLRA by requiring such an untoward result.

In sum, the definitions set forth in the Act and the basic structure of the Act clearly support the conclusion that paid union organizers are not protected "employees." In light of this conclusion, there was no reason for the D.C. Circuit ever to consider the common law meaning of the term "employee." Furthermore, the court's common law analysis can be faulted because the court defined the term "employee" without regard for the NLRA's policies and structure.

The D.C. Circuit began by correctly observing that an individual could be " 'the servant of two masters, not

---

[17] In this sense Hendrix is clearly different than the zealous volunteer that the D.C. Circuit perceived as largely "indistinguishable" from the paid organizer. The services of the zealous volunteer would always be available to the union without any monetary outlay. By contrast, Hendrix's presumably professional organizing services were only available for a price.

joint employers, at one time as to one act if the service to one does not involve abandonment of the service to the other.'" *Willmar*, 968 F.2d at 1329-30 *quoting*, Restatement (Second) of Agency § 226 (1958) (other citations omitted). The court then declared that "[u]ntil such time as an employee 'abandons' the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act." *Id.* at 1330. That conclusion ignores the adversarial relationship between employers and unions codified by the NLRA and demonstrated in its underlying policies. As this Court has recognized, the structure of the NLRA demonstrates that unions and employers are essentially "separate factions in warring camps." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947). As such, a paid union organizer's organizing activities on behalf of the union could be construed as nothing less than an "abandonment" of the non-union employer in favor of service to the union. Thus, even under the D.C. Circuit's statement of the common law definition of the term, Hendrix could not reasonably be deemed an "employee" of both Willmar and the IBEW at the same time.

Finally, a determination that a paid union organizer like Michael Hendrix is not an "employee" under the NLRA will not chill the rights of *bona fide* employees to form, join and assist labor organizations.[18] *Bona fide* employees, who have a stake in the employer's enterprise, and who will endure the consequences of whatever union

---

[18] Indeed, Hendrix's lack of interest in a true employment relationship with Willmar is apparent. Hendrix was on a leave of absence from *another* employer in order to be a full-time paid union organizer when he applied for a job with Willmar. He took over two weeks to fill out and deliver his employment application to Willmar's foreman, Mr. Rose, and was fully employed as an IBEW organizer when he submitted the application. Finally, prior to applying for a position with Willmar, Hendrix had organized and actively participated in picketing of Willmar's job site in protest of Willmar's allegedly substandard wages.

choice is ultimately made by the employee group, will still enjoy all of the rights afforded them under the NLRA. Unions will still be able to appeal to employees within the broad parameters permitted by the Act. Unions will simply not be able *to require* employers to effectively subsidize this appeal by the forced employment of professional organizers like Hendrix who have no interest in being employed by the employer except as a vehicle to serve the purposes of the union.

In sum, the conclusion of the D.C. Circuit that paid union organizers are "employees" who must be employed by employers without regard to their status as union organizers is inconsistent with the language of the NLRA, and is inconsistent with the policies and purposes which the Act seeks to foster.

CONCLUSION

For the foregoing reasons, the Chamber and the NAM urge the Court to grant the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF
MANUFACTURERS OF THE
UNITED STATES
1331 Pennsylvania Ave., N.W.
Suite 1500-North Lobby
Washington, D.C. 20004
(202) 637-3000

PETER G. NASH *
MARSHALL B. BABSON
ELIZABETH I. TORPHY-DONZELLA
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
2400 N Street, N.W.
Fifth Floor
Washington, D.C. 20037
(202) 887-0855

Counsel for the Chamber of Commerce of the United States of America and for the National Association of Manufacturers of the United States of America Amici Curiae

* Counsel of Record

Date: January 21, 1993